DATE: JUNE 13, 1996

CASE NO: 94-INA-576

In the Matter of

BERK'S WAREHOUSING & TRUCKING
Employer

on behalf of

ALFONSO TLATENCHI
Alien

Before: Jarvis, Huddleston and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Berk's Warehousing & Trucking's ("Employer") request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of a labor certification application. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On December 10, 1992, the Employer filed a Form ETA 750, Application for Alien

Labor Certification, with the State of New Jersey Department of Labor, Division of Employment Services ("NJDOL") on behalf of the Alien, Alfonso Tlatenchi. AF 2-3. The job opportunity was listed as "Wharehouseman," [sic] and the job duties were listed as follows:

> Wharehouseman [sic] - moves assigned items to shipping or repositioning, according to supervisor's instructions. Unloads trucks, both manually and by pallet lifter. Assists in inventory taking.

AF 3. Originally, the rate of pay was listed as $5.00 per hour. *Id.*

On March 22, 1993, the NJDOL notified the Employer that the prevailing wage for a warehouse worker was $9.91 per hour. AF 4, 8-9. This rate was based on the prevailing wage for a related occupation, "Materials Handler," as listed in the 1992-93 *New Jersey Business Industry Association Compensation Report.* AF 4. On March 21, 1993, the Employer appears to have amended its wage offer to $8.00 per hour based on a wage survey that it had conducted of four of its competitors.[1] AF 11-12. The Employer included a copy of its wage survey and demanded that the NJDOL provide it with the data and statistics used, and a list of the entities surveyed in the *New Jersey Business Industry Association Compensation Report* that was relied on in determining the prevailing wage. AF 12.

Thereafter, on June 3, 1993, the NJDOL notified the Employer that the Prevailing Wage Unit's wage determination for the job had been "adjusted" to $10.65 per hour based on a U.S. Department of Labor Employment Standards Administration Prevailing Wage Determination for the area. AF 15-16. The NJDOL noted that the regulations required that the prevailing wage determination be made pursuant to the McNamara-O'Hara Service Contract Act. AF 16. On April 26, 1993 the Employer sent a letter to the NJDOL stating that the wage survey that it had conducted was accurate and that the Prevailing Wage Unit's wage determination was overly-inflated. AF 20. Thus, the Employer refused to amend its wage offer.

The application was thereafter forwarded to the CO on May 12, 1993. AF 25-26. On April 14, 1994, the CO issued a Notice of Findings ("NOF") in which she proposed to deny the application for failure to offer the prevailing wage. AF 27-28. The CO required the Employer to either amend its wage offer to $10.65 per hour and document its willingness to advertise or submit countervailing evidence that the prevailing wage determination is in error. The CO indicated that the Employer's April 26, 1993 wage survey did not constitute countervailing evidence "because when there is a determination for an occupation covered by the Service Contract Act in the same geographic area, employer must offer at least the

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[1] The Employer initially stated that this wage survey was conducted for the position of "Lace Paper Machine Operator." AF 12. However, in a letter dated April 26, 1993, the Employer stated:

> Please be advised that the reference to "Lace Paper Machine Operator" inm [sic] our previously submitted prev. wage (pw) survey was a **clerical error**. The wage survey offered was both local and current and reflects wages paid for wharehouseman [sic] in this locale.

AF 20 (emphasis in original).

current Service Contract Act wage." AF 27.

Employer filed a rebuttal wherein it declined to amend its wage offer, arguing that the Service Contract Act does not apply in this case because it only governs contracts with the U.S. government for "services" furnished in the United States, and because the "concept that services include wharehousing [sic] is absolutely too broad." AF 30. The Employer asserted that the Act "gives no definition to the concept of services" and disagreed with the CO's interpretation that "services" under the Act include "any work, except [that] listed by [the] statute in Sec 7." *Id.* The Employer instead suggested:

> that services were meant to signify much more than just ordinary work. We suggest respectfully that "services" include those works which deal directly with facilitating the actions of people, as opposed to things. The CO . . . suggests a very demeaning and dehumanizing interpretation, wherein the employee "serves" things, thereby exalting the thing over the person. From the ancient roots of the word, one who serves was one who was mandated or attached to the care of an individual person or family.

AF 29-30.

On May 19, 1994, the CO issued a Final Determination ("FD") denying certification. AF 31-33. The CO found that the Employer had failed to either increase the wage offer or produce evidence showing that the prevailing wage determination was in error. AF 32. The CO noted that the job of warehouseman does not fall within one of the exceptions to the Act and, in fact, is included under Section 4.130 of the regulations as a job that has been specifically found to be within the coverage of the Act. AF 31.

On June 2, 1992, the Employer filed a Petition for Review on the grounds that the CO erred in finding that the job opportunity is subject to a wage determination under the Service Contract Act and that the CO arbitrarily applied the Service Contract Act "to virtually every type of employment, as only those who work for themselves do not provide any kind of a service." AF 42.

DISCUSSION

The regulations contain specific procedures for determining the prevailing wage for labor certification purposes. Under 20 C.F.R. §656.20(c), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under section 656.40. Section 656.40 provides that:

> [i]f the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR Part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq., 29 CFR Part 4, the prevailing wage shall be at the rate required under the statutory determination. Certifying Officers shall request the assistance of the DOL Employment Standards Administration wage specialists if they need assistance in making this determination.

The Employer argues that the job opportunity of "warehouseman" is not subject to a wage determination under the Service Contract Act. However, we note that under the Act, a "service employee" means any person engaged in the performance of a contract . . . not

exempted under section 7 [of the Act], . . . the principal purpose of which is to furnish services . . . (other than any person employed in a bona fide executive, administrative, or professional capacity . . .)." 29 C.F.R. §4.113(b). The duties of a warehouseman do not fall within the types of services or contracts for services which are specifically excluded under the Act. *See* 29 C.F.R. §§4.113(a)(2), 4.115(b)(1) - (7). In fact, inventory services and warehousing and storage services are the types of services called for in service contracts that have been found to come within the coverage of the Act, 29 C.F.R. §4.130(24), and (55), and a prevailing wage determination for the area was available.

The Employer also asserts that the Service Contract Act does not apply because it only governs contracts with the U.S. government for "services" performed in the United States. However, the question here is not whether there is a service contract covered under the Act, but whether the occupation is subject to a wage determination under the Service Contract Act. *Cf. Standard Dry Wall,* 88-INA-99 (May 24, 1988) (*en banc*) (The issue is not whether the employer is subject to the provisions of the Davis Bacon Act, but whether the occupation is subject to a wage determination under the Davis Bacon Act.) As this job has been found to be subject to a wage determination under the Service Contract Act, the Employer's argument is without merit.

The CO properly concluded that the prevailing wage for the job of "warehouseman" in the Employer's locality is $10.65 per hour as determined by the McNamara-O'Hara Service Contract Act. As the Employer has refused to raise its wage offer to the amount required under the statutory guidelines of the Act, the CO's denial of certification must be affirmed. *Haricon Industries, Inc.,* 94-INA-135 (May 26, 1995).

ORDER

The CO's denial of labor certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

DBJ/mg/bg